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Utah Supreme Court

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Recommended Citation

Brief of Appellant, *Sterling's Service v. Maughan*, No. 16918 (Utah Supreme Court, 1980).
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IN THE SUPREME COURT OF THE STATE OF UTAH

STERLING'S SERVICE

*

Plaintiff,

*

vs.

*

CASE NO. ~~17590~~ 16918

ROBERT B. MAUGHAN and CANDY
MAUGHAN

*

*

Defendants.

DEFENDANT'S BRIEF

Appeal from the First District Court

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FILED

MAY - 1 1980

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Plaintiff,

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IN THE SUPREME COURT OF THE STATE OF UTAH

STERLING'S SERVICE

*

Plaintiff,

*

vs.

*

Case No. ~~17590~~ 16968

ROBERT B. MAUGHAN and CANDY
MAUGHAN

*

*

Defendants.

BRIEF OF APPELLANT

Statement of the Nature of the Case

The Appellant is appealing from a Judgment of Dismissal of the Defendant's Counterclaim against the Plaintiff alleging violations of the Utah Uniform Consumer Credit Code.

Relief Sought on Appeal

Appellant seeks a reversal of the District Court's Order of Dismissal of the Defendant's Counterclaim, for damages, penalties, attorney's fees and other relief as provided in the Uniform Consumer Credit Code.

STATEMENT OF FACTS

The Plaintiff is the owner and operator of a service station and grocery store in Garden City, Utah, selling merchandise in consumer related transactions. The Defendants were customers of Plaintiff and purchased consumer related items. Defendants

became indebted to the Plaintiff by reason of purchases made upon an open account. Evidence of the account was sales slips, some of which contained a provision for the payment of interest at 1% per month. The parties also entered into a written agreement for Defendant to purchase a snowmobile, contemplating re-sale of the contract to a bank. Assignment to the bank was not made as contemplated and the parties incorporated the snowmobile purchase into the open account. The parties orally agreed that no interest would be charged on the account so long as payments were made on the account. (Transcript 4 lines 4-25.) In the early months of 1978, the Maughans moved from the Bear Lake area and returned to Cache County. The Plaintiff's attorney then made demand upon them for the payment of the account plus interest and attorney's fees. The parties were unable to agree upon the balance of the account, however, on October 18, 1978 the Defendants paid to the Plaintiff's attorney the sum of \$3,000.00 as was their agreement to pay the money upon sale by the Defendant of his backhoe tractor. Following payment of the \$3,000.00, the Plaintiff brought suit against the Defendant on December 18, 1978 claiming principal due of \$5,548.75 and alleging interest due at the rate of 18% per annum of \$2,999.84. (See original Complaint). The Plaintiff elected in the

Complaint to treat the payment of \$3,000.00 as a payment against accrued interest. (See paragraph 7 of Complaint.) Plaintiff further claimed attorney's fees and interest at the rate of 18% per annum. (Paragraph 6.) Defendants answered the Complaint.

Plaintiff filed an amended Complaint and alleged a rate of interest due of 12% per annum, "compounded" annually with the right reserved to "compound monthly". (See amended complaint)

The Defendants answered the Amended Complaint and Counterclaimed against the Plaintiff for damages as a result of the Plaintiff's continued violations of the UCCC, relating to the failure of the Plaintiff to give proper disclosure of interest rates charged in violation of Plaintiff's agreement not to charge interest and the charging of usurious interest rates.

At the time of trial, Sterling B. Rich, the Vice president of Plaintiff testified as follows: (TR. P, 7)

A. That plaintiff was not a regulated or supervised lender in the state of Utah.

B. There was never a disclosure statement made by the Plaintiff to the Defendant.

C. There was never a notification given and agreement signed by the Defendants that interest would commence to run or attorney's fees may be charged on the account.

D. The snowmobile contract was for annual percentage rate of 18.16% which the Plaintiff wanted compounded interest.
(TR. 16)

E. That Plaintiff now seeks interest for all times relevant to the account at 18% and/or 12%, notwithstanding payment of \$3,000.00 by the Defendants and an absence of a written agreement.

F. The snowmobile contract was for annual percentage rate of 18.16% which the Plaintiff wanted compounded interest.
(TR.16)

The trial Court granted Judgment for the Plaintiff against the Defendants for an amount on the open account substantially less than that prayed for by the Plaintiff and dismissed Plaintiff's claims for interest at 12% and 18% and attorney's fees. Defendants satisfied the Judgment prior to perfecting this appeal. The trial Court dismissed the Defendants' Counterclaim and awarded no attorney's fees to the Defendant.

POINT I

THE TRIAL COURT ERRED IN DISMISSING DEFENDANTS' COUNTERCLAIM AS IT RELATED TO PLAINTIFF'S VIOLATION OF THE UNIFORM CONSUMER CREDIT CODE FOR THE FAILURE TO DISCLOSE THE INTEREST RATE CHARGED.

As indicated in the Statement of Facts, the Plaintiff and the Defendant agreed that so long as payments were made on the open account no interest would be charged on the account. The last payment made by the Defendants was \$3,000.00 and was paid on October 18, 1978. A Complaint was filed December 18, 1978 by the Plaintiff alleging 18% interest due on the open account. It was thereafter amended to 12% interest due.

The Plaintiff admits that at no time were disclosures made.

At the time of the enactment of the UCCC the legislature repealed substantially all of Title 15 Chapter 1 relating to interest rates leaving only Section 15-1-1 relating to the interest rate for the forbearance of money and Section 15-1-3 relating to calculation of interest and Section 15-1-4 relating to interest on Judgments.

The effect of this legislative action is to abolish maximum interest rates except in the two remaining situations.

Coextensive with the repeal of the Sections relating to maximum interest rates, the legislature passed the UCCC which provides for maximum interest charges for consumer related transactions, which are defined as the granting of credit by a seller who regularly engages as a seller in credit transactions and the buyer is a person other than an organization and the goods or services are purchased primarily for personal, family, household or agricultural purchases and the debt is payable in installments. (See 70B-2-104)

A review of the evidence shows unquestionably that the items involved in this matter are consumer related sales and fall within the purview of the statute.

Maximum charges are established by Section 70-B-2-201 at 18% per annum or a sliding scale of interest rates based upon

the balance due.

Sub-section 1 of the same section states that, "With respect to a consumer credit sale, a seller may contract for and receive a credit service charge not exceeding that permitted by this section".

The clear import of this language is that the parties may "contract for" a rate of interest not exceeding the statutory limitations. Failure of the parties to "contract for" a rate of interest, allows only the charging of interest as provided in Section 15-1-1 UCA for the forbearance of money. In the present case, the parties "contracted for" no interest to be charged so long as payments were made. The Complaint violates the agreement between the parties and the law by attempting to collect a rate of interest which was not "contracted for".

The Plaintiff admitted that no disclosures were made to the Defendants with regards to an interest rate to be charged. Yet, Plaintiff's first and amended Complaint both contained interest rates in excess of that allowed by 15-1-1 without the benefit of a "contracted for" agreement.

Section 70B-2-301 sub-paragraph two states as follows:

"The sellers shall disclose to the buyer to whom credit is extended with respect to a consumer credit sale, the information required by this part", or.....

Section 70B-2-302 states that the disclosures shall be made clearly and conspicuously, in writing, a copy of which will be delivered to the buyer and shall contain a statement as to the rate of credit service charge in terms of the ANNUAL PERCENTAGE RATE, the purchaser is "contracting for".

The seller in this case candidly concedes that no such disclosure was made to the Defendants. Yet, at the time of the commencement of this suit, Plaintiff had received a payment of \$3,000.00 upon the account all of which the Plaintiff elected to apply to the accrued interest which Plaintiff accrued at the rate of 18% per annum, in violation of Plaintiff's prior specific agreement not to charge interest and in violation of the provisions of the Utah Uniform Consumer Credit Code.

70B-1-102 states that the UCCC shall be liberally construed and applied to promote the purposes and policies of the act which are to simplify, clarify and modernize the law relating to retail installment sales, consumer credit, small loans and usury; to provide rate ceilings to assure an adequate supply of credit to consumer and to further consumer understanding of the terms of credit transactions and to protect consumer buyers against unfair practices by some suppliers of consumer credit having due regard for the interest of legitimate and scrupulous creditors. The evidence in this case would indicate that the

Defendant has not received the protection against unfair practices, and has been charged an unlawful rate of interest without disclosure and has been brought into Court as a result of a suit commenced by Plaintiff. A substantial payment was collected and credited to unlawfully charged rate of interest.

Section 70B-5-203 provides for the civil liability for violation and disclosure provisions. It states that the creditor is liable for an amount equal to the sum of the actual damages sustained as a result of the failure to disclose and in the case of an individual action twice the amount of any finance charge in connection with the transaction and in the case of a successful action to enforce liability provided in the sub-section, the costs of the action together with a reasonable attorney's fee as determined by the Court.

In this case it would appear that the actual damage sustained by the Defendant is the amount of \$3,000.00. This was the amount that the Plaintiff applied to accrued interest in Plaintiff's Complaint to which the Defendant had to answer and seek redress in Court to relieve himself of the liability. It would also appear that the Defendant is entitled to twice the amount of any finance charge as alleged in the plaintiff's Complaint together with costs of court and attorney's fees.

The trial Court in its finding held that the agreement

between the parties was to the effect that no interest would be charged so long as payments were made. The Court determined a period of time when payments were not further made and charged 6% at that time. By reason of this holding, the Court held as a matter of fact that there was no contract or monies received as a charge in excess of the amount allowed by the act. The Court erred at this point by reason of the fact that the Plaintiff not only attempted to collect 18%, 18.16% and 12% interest, but also collected interest in the amount of \$3,000.00 which by virtue of Plaintiff's first Complaint is credited to the accrued interest. But for the Defendant's Answer, Counterclaim and desire to contest this matter, it is certain that Plaintiff would have retained the \$3,000.00 payment as payment of accrued interest at 18% and proceeded to collect the balance due. This is precisely the type of situation that the statute seeks to prevent. The fact that the Court made a finding that there was no contract for an interest rate cannot serve as a bar to the Defendant's rights of recovery.

Plaintiff's right of recovery accrued at the time the Plaintiff attempted to charge and collect interest in excess of 6% per annum without an agreement therefore, and failed to properly disclose provisions. Section 70B-5-203 states that:

"A creditor who in violation of the provisions on disclosure..... fails to disclose information to a person entitled to the information under this act is liable to that person in the amount equal to the sum of;"

Plaintiff's first and amended Complaints and his testimony as related by the transcript are irrefutable evidence of the right of the Defendant to recover damages as provided in Section 70B-5-203.

See the case of Bill Brown Motor Inc., vs. Crane, Oklahoma 1978 589 P2d 708 where the Plaintiff, the seller of a pickup truck failed to disclose credit information. The Court held that the failure to properly disclose information as required entitles the person to twice the amount of the finance charge not to exceed \$1,000.00, plus attorney's fees and costs. The Trial Court held that the Defendant was obligated on the promissory note in question. However, the Court found that the Trial Court failed to consider the applicable parts of the UCCC in granting the Plaintiff a judgment for \$2,000.00 plus interest and attorney's fees. The Court remanded the matter to the Trial Court to redetermine the issues relating to the UCCC.

This Court addressed itself to the proposition at bar in Knox vs. Thomas 30 Utah 2d page 15, 512 P 2d 644 where the Defendant was a used car dealer and entered into a contract with the Plaintiff to sell a car without meeting the disclosure

requirements of the UCCC and the Court held as follows:

"The Defendant admitted that he failed to disclose the annual percentage rate in the contract and we must conclude that the trial Court correctly ruled that the Defendant failed to establish a defense under Section 70B-5-203. The wisdom of the statutory scheme is not for the Court to decide."

This Court affirmed the Trial Court decision.

Oklahoma in 1973 decided, as a case of first impression, the matter between Kuykendall vs. Malernee found in 516 P2d 588. This case is significant in several respects as it relates to this case.

The facts are as follows: That at the time of the case Oklahoma had enacted the UCCC and Kuykendall brought the action against Malernee to have a consumer loan declared void, to negate the necessity of repaying either the principal or interest, and to collect damages by way of civil penalties for failure of the lender to disclose rates charges and other required matter. Kuykendall contended that the transaction was a supervised consumer loan and that Malernee was not a supervised lender and had no license to make such loans, that the finance charge was in excess of that allowed by law and the lender failed to make any disclosure.

Malernee contends that the transaction was a sale whereby Kuykendall sold the car for \$600.00 with the understanding that he could buy it back in six months for \$720.00.

The issues presented in that case closely parallel the issues presented in this case. The Trial Court found that the transaction was a loan at the rate of interest depending upon the testimony was in excess of 18% and ranged up to 40% per annum. That the Defendant was not a supervised lender. The Court found that the loan was void and that debtor Kuykendall was not obligated to pay either the principal nor the loan finance charge.

The Court allowed recovery under one section only of the statute and granted reasonable attorney's fees in the amount of \$600.00.

The Court of Appeals of the State of Oklahoma held with respect to whether or not multiple claims could be asserted against a lender as follows;

"The statutory violations seem sufficiently distinct or separate to impose all of the various penalties on a lender if he has committed all these violations in the course of a single loan as occurred in the case at bar. Otherwise, the legislative intent to discourage or proscribe the described acts or omissions of lenders is not fully effectuated".

"Why should a borrower not be allowed to seek every regress of the wrongs committed against him?" Each section of the UCCC part 2 Article 5 sets forth certain remedies of the debtor in the event of violations of the code by a creditor and it would appear to be unjust to allow the injured borrower to recover for only one violation. Voidness of the loan is the penalty arising because of an excessive interest rate and is completely separate from the penalty for violation of the disclosure requirements".

The Court citing Ratner vs. Chemical Bank of New York &

Trust Company 329 Fed Supp. 270 stated further that:

"Both sections of the Consumer Credit Code providing for civil remedies for charging excessive interest and failure to disclose may be awarded the Plaintiff".

Draftsmen of the Credit code in evaluating methods of penalizing violating creditors, considered that the debtors should be compensated and provided with sufficient incentive to bring an action upon all alleged violations and at the same time that an acceptable penalty of practical effectiveness and of deterrent value should be imposed upon the erring lender".

The Court of Appeals remanded the case to the Trial Court to redetermine a reasonable attorney's fee and damages.

In the Kuykendall case, as in this case, an obligation was incurred without proper disclosure and the Courts have held that the consumers have a right to the remedies provided by the statute.

This position is further supported by Federal Regulation "Z" effective July 1, 1969 which provides that the failure to make disclosure as in regulation "Z" will enable the consumer to sue for twice the amount of the finance charge for a minimum of \$100.00 or maximum of \$1,000.00 together with attorney's fees.

Essentially, the Utah Statute is a codification by the State of Utah of regulation "Z" of the Federal Reserve Regulation.

POINT II

THE TRIAL COURT ERRED IN DISMISSING THE DEFENDANT'S COUNTERCLAIM AS IT RELATED TO PLAINTIFF'S VIOLATION OF THE UTAH

UNIFORM CONSUMER CREDIT CODE PROVISIONS FOR ATTEMPTING TO CHARGE
INTEREST IN EXCESS OF THAT ALLOWED BY LAW.

The Plaintiff executed with the Defendant a contract to purchase a snowmobile. See Exhibit entitled, "Conditional Sales Security Agreement" in which the annual percentage rate is expressed as 18.16% per annum. The contract also includes credit life and diasability insurance in the amount of \$69.99 which was never obtained.

The Plaintiff admitted that he was not a regulated or supervised lender as required by the State of Utah under the provisions of 70B-3-501.

Although the statute does not proscribe sanctions for the failure to register as a regulated and supervised lender, without such a license the Plaintiff is without authority to charge in excess of 18% per annum interest and the Plaintiff's agreement on its face provides for a rate of interest in excess of 18% which is a clear violation of the law.

Plaintiff's attempt to collect an amount clearly in violation of the law is evidenced in the reading of the transcript page 14 through 17 where the Plaintiff indicated that he was not a regulated nor a supervised lender and that he intended to enforce the contract as it was written.

Section 70B-2-109 defines a credit service charge to mean the sum of all charges payable directly or indirectly by the buyer incident to the extension of credit. The maximum charges are established in Section 70B-2-201.

The Plaintiff disclosed the interest rate as provided in 70B-2-301 and the following Section.

The Plaintiff commenced this action via the filing of a Complaint alleging only a sum due and payable apparently indicating that the entire obligation was treated as an open account. However, by virtue of an amended Complaint, the Plaintiff sought collection against the Defendants in paragraph 4 of the amended Complaint stating as follows:

"The figures have been calculated as if compounding was accomplished annually. The Plaintiff reserves the right to re-calculate as if all compounding were to be done monthly."

This is clearly in violation of the law to the extent that interest in the annual percentage rate as defined by the statute is a simple interest and not a compounded interest rate. Therefore, the action of the Plaintiff in filing the Complaint constitutes a violation of Section 70B-5-202 (2) which provides that if a creditor has violated the provisions of this act applying to the authority to make supervised loans, the loan is void and the debtor is not obligated to pay either the principal or loan finance charge. If he has paid any part of the principal

or the loan finance charge, he has a right to recover the payments from the person violating this act or from an assignee of that person's right who undertakes direct collection of payments or enforcement of rights arising from the debt."

Sub-section 4 of UCA 70B-5-202 states that if a creditor has made an excess charge in deliberate violation of or in reckless disregard of the act, the penalty may be recovered even though the creditor has refunded the excess charge.

Paragraph 7 provides that if the creditor establishes by a preponderance of the evidence that a violation is unintentional or is a result of bona fide error, no liability is imposed. Sub-paragraph 8 provides for the payment of attorney's fees.

The evidence from the transcripts indicates that the Plaintiff is not a supervised or regulated lender. The contract provides on its face for an interest charge in excess of that provided by law and the complaint asks for the compounding of interest. Direct collection efforts were made by virtue of the filing of the Complaint and the \$3,000.00 was applied as indicated by the Defendant's first Complaint against interest and, therefore, in accordance with sub-section 2 the Defendants have the right to recover the payment from the person violating the act.

The record shows that it is the intention of the plaintiff to collect in accordance with the terms of the contract. By

reason thereof there is, in fact, a deliberate violation of the act negating sub-section 7 which provides for the unintentional or bona fide error omission from the act. It would appear, therefore, that not only is the Defendant entitled to repayment of the amount collected, but also attorney's fees for the intentional charging and attempted collection of an interest rate in excess of that provided by the act.

The Trial Court held the snowmobile contract, in fact, became part of the open account which drew interest at the rate of 6% per annum.

This conclusion reached by the Trial Court does not, however, negate the fact that the Plaintiff "attempted direct collection" (70B-5-202) upon a contract for consumer goods which contract was on its face in violation of the UCCC. And, it is the execution of the contract and attempted collection on the part of the Plaintiff which gives rise to the Defendant's rights to recover on Defendant's Counterclaim.

See the case of Kuykendall vs. Melernee cited Infra stated as follows:

"The commissioners on Uniform laws in proposing the consumer credit code recognized that the borrower would not be afforded the greatest measure of protection unless the lender was deterred from over charging him by sanctions that, in effect, imposed an automatic heavy fine for violating the law and the protection it sought to give the

borrower. Under Section 5-202(2) both the principal and excessive finance charge are made uncollectable by terming any such unauthorized supervised loan void. Similar provisions have been construed against the creditor. Beuford vs. American Finance Company 333 Fed. Supp. 11243, Beneficial Finance Company vs. Administrator 260 Md 430, 272 A 2d 649. Void, as that term is used in this provision, does not mean that the transaction is to be considered for other purposes as if it had never occurred. In the very same provision the borrower is allowed to recover any payments made. Subdivision 4 of the same section allows the debtor to collect additional penalties for any excess charge not refunded even following refund if the creditor's violation of that section is deliberate or in reckless disregard thereof".

As stated by this Court in the case of Knox vs. Thomas 512 P2d 644 as follows:

"However, it appears that the legislative intent was to rely on the system of private policing by permitting those who might be wronged by violation of the act to recover a penalty."

It would appear, therefore, not only is the Defendant entitled to recover for the violations of disclosure, Defendant is entitled to recover for the intentional and deliberate charging of a rate of interest in excess of 18% by a person not a supervised lender.

POINT III

DEFENDANTS ARE ENTITLED TO RECOVER ATTORNEY'S FEES WHERE THE UNDISPUTED FACTS DISCLOSE THAT THE PLAINTIFF VIOLATED THE PROVISIONS OF THE UCCC IN ATTEMPTING TO COLLECT FINANCE CHARGES AT AN UNDISCLOSED INTEREST RATE.

See also 29 ALR Fed. 906 - 914 where there appears many annotations setting forth the rights to attorney's fees for successful litigants in consumer credit cases suffered.

Following the commencement of this action by the Plaintiff, it is readily apparent that the Defendants needed the services of an attorney to defend Defendants against the imposition of unreasonable and unlawful interest charges.

Attorney's fees were incurred as a result of the filing of an Answer and Counterclaim, investigation of this case and ultimate trial of the matter.

To compare Plaintiff's initial claims versus the ultimate outcome of the case, would indicate that the Defendants were successful in establishing the fact that the account was substantially less than originally claimed by the Plaintiff and that the interest as originally claimed by the Plaintiff was not, in fact, due and owing.

The Trial Court in its Memorandum Decision indicated that the Defendants had not "contracted for or received a charge" (70B-2-201 and 70B-3-201) in excess of that allowed by this act.

It is conceded that the creditor did not contract for a rate of interest in excess of that allowed by the act, but the Defendants "received a charge in excess of that allowed by the act", which is undisputed by virtue of the fact that two

Complaints were filed by the Plaintiff, each seeking to charge interest rates in which there was a failure of disclosure and in one instance an interest rate specified in an agreement in excess of that allowed by law, in the other instance.

The trial Court further found as follows:

"Nor is there any question of payment being made in excess of that allowed by the act".

The uncontroverted evidence shows that the Defendants made a \$3,000.00 payment which the Plaintiff in the first Complaint alleges, was applied solely to the accrued interest calculated at the rate of 18% per annum by virtue of paragraphs 6 and 7 of the first Complaint.

A Complaint is a written demand for relief made through a Court which requires affirmative action on the part of the Defendant. And, by reason of the Complaint being filed in this matter, the Defendants were obligated to retain an attorney for the defense of this matter. And, by reason of the violations of the UCCC, Defendant is entitled to attorney's fees under the separate provisions of UCA 70B-5-202 and 70B-5-203.

See Kuykendall vs. Malernee, Oklahoma 516 P2d 588, where the Court said:

"Draftsmen of the Credit Code, in evaluating methods of penalizing violating creditors, considered that the debtors should be compensated and provided with sufficient

incentive to bring an action upon all alleged violations and at the same time that an acceptable penalty of practical effectiveness and deterrent value should be imposed upon the erring lender. The Court also said that we further hold the trial Court's conclusion expressed in paragraph 9 of its findings that other penalties should not be allowed, is hereby reversed together with the \$600.00 award of attorney's fees and the case is remanded to the trial Court to determine these matters as the evidence may warrant and for such other further proceedings as may be required under the circumstances not inconsistent with the views set out herein".

CONCLUSION

The Uniform Consumer Credit Code in the State of Utah is presently in excess of 10 years old.

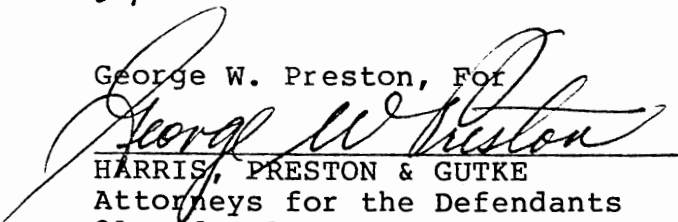
It is a law which credit grantors are familiar with and presently use in their daily business affairs. The purpose of the UCCC and regulation Z is to convey information to potential debtors in a manner that allows such potential debtors to make intelligent informed decisions as to the costs of available credit. In order to better effectuate this purpose, the Courts have held that the act and regulations are to be liberally construed and the requirements contained therein are to be strictly enforced. See G.A.C. Finance Corporation of Spokane vs. Burgess, Washington App. 588 P 2d 1386.

This Court has held, in the case of Knox vs. Thomas 1973 512 P2d 644, that the legislation was championed by lenders and other various organizations who were willing to assume the duty of disclosure for the right to charge higher rates of interest

provided for in the legislation. The legislation provided that persons willfully and knowingly violated certain provisions of the act would be guilty of a misdemeanor. However, it appears that the legislative intent was to rely upon a system of private policing by permitting those who might be wronged by violations of the act to recover penalties. The Plaintiff in the above entitled matter has clearly demonstrated its own violations of the Act without any attempt on Plaintiff's part to show the acts were not intentional or resulted from bona fide error. The amendment of the Complaint by the Plaintiff continuing to allege an undisclosed rate of interest in continued violation of the UCCC serves only to confirm the flagrancy of the violation of this act by the Plaintiff and to confirm the Defendant's right to recover damages, penalties and attorney's fees for each of the violations as provided by the law.

RESPECTIVELY submitted this 29th day of April, 1980, by:

George W. Preston, For


HARRIS, PRESTON & GUTKE
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Logan, Utah 84321

CERTIFICATE OF MAILING

I hereby certify that I mailed two true and correct copies of the foregoing Brief to Attorney Raymond N. Malouf, attorney for the plaintiff at 21 West Center Street, Logan, Utah 84321 on this 24th day of April, 1980.


George W. Preston